United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1502

To be argued by
BARRY MALLIN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

REUBEN DARIO PARRAS,

Appellant.

Docket No. 76-1502

BRIEF FOR APPELLANT REUBEN DARIO PARRAS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction of the United States District Court for the Eastern District of New York (The Honorable John F. Dooling, Jr.) entered on October 22, 1976, after a jury trial convicting appellant of knowingly and intentionally distributing approximately twelve ounces of cocaine on April 9, 1976 in violation of 21 U.S.C. Section 841 (a)(1) and 18 U.S.C. Section 2.

This Court continued Barry Mallin, Esq., as counsel on appeal, pursuant to an appointment under the Criminal Justice Act.

STATEMENT OF FACTS

In August, 1976, appellant was convicted by a petit jury in the Eastern District of New York of one count of unlawfully distributing approximately twelve ounces of cocaine on April 9, 1976, in violation of 21 U.S.C. Section 841 (a)(1) and 18 U.S.C. Section 2.*

The government presented three witnesses: a bilingual undercover agent, ANGEL RODRIQUEZ; the case agent, FRANK BERBERICH; and a spanish interpretor, MARGRITA MANSA.**

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* The case against Yolanda Bolanos, who was indicted as appellant's co-defendant on this charge, was previously dismissed when she pleaded guilty to a March 15, 1976 sale to the same undercover officer.

** The testimony of the government chemist identifying the contraband in question as cocaine was stipulated to by both counsel.

The overriding issue in this appeal concerns that part of the testimony of Agent Rodriquez in which he was permitted, over appellant's objection, to relate to the jury out-of-court statements allegedly made by YOLANDA BOLANOS linking the appellant to the April 9th transaction.

Testimony of Agent Rodriquez

1. The Transaction

On March 15, 1976, Agent Rodriquez purchased a quantity of cocaine from Yolanda Bolanos (16-17).* As a prelude to negotiating the purchase of a larger quantity of cocaine in an effort to locate her source of supply, Agent Rodriquez telephoned Ms. Bolanos at 10:15 p.m. on April 7, 1976. During the course of the conversation, Ms. Bolanos dictated a telephone number proported to be that of her connection (17, Exhibit Gx-3A).

At 10:30 p.m. on April 7th, Agent Rodriquez recorded in Spanish a telephone call made to his home by Ms. Bolanos (27). She said she was "at this guy's house" (Government's Exhibit Gx 3-B).** She said that the deal was set for the next day. A male voice, later claimed by Agent Rodriquez to be the appellant, then spoke on the telephone in low tones for a period of fifteen seconds (29), during which a deal was agreed to that would take place the next day between 2:30 and 3 in the afternoon. Price was to be discussed with Ms. Bolanos (29).

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* Numerals in parenthesis are to pages in the trial transcript.

** The telephone number supplied by Ms. Bolanos was later discovered to be listed under the name of LIVIA BUTRON, not the appellant. In any event, since this was an incoming call, it was never established that it actually originated from Ms. Butron's apartment (62).

Ms. Bolanos returned to the telephone and agreed to meet Rodriquez the following day in Brooklyn and that the price would be the same as previously discussed. As a result of prior negotiations with Ms. Bolanos, the transaction called for the purchase of eight ounces of cocaine for a price of $8600 (35, 61-62).

On April 8th, Rodriquez made further arrangements with Ms. Bolanos to complete the purchase at 3 p.m. that same afternoon at Junior's Restaurant in Brooklyn (35).

Agent Rodriquez went to the location, but Ms. Bolanos failed to show and the deal was never consummated (35-36).

Thereafter, Agent Rodriquez had no further contact or communication with the appellant--if indeed it was the appellant who spoke on the telephone on April 7th--until the appellant was arrested six weeks later on May 18, 1976.* At no time did Agent Rodriquez or any other law enforcement officer enter into any discussions with the appellant regarding a transaction scheduled to take place on April 9th, nor was the appellant present at any such negotiations nor was he present when Ms. Bolanos completed the transfer of the cocaine to the undercover agents on April 9th (66).

All discussions or negotiations relating to an April 9th deal were made exclusively with Ms. Bolanos. Further conversations between Agent Rodriquez and Ms. Bolanos on April 8th resulted in a new agreement that now called for Ms. Bolanos to sell the agent, not eight, but twelve ounces of cocaine for a price of $13,200 (36-37).

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* Agent Rodriquez claimed that he was seeking someone known as "Roberto," but he testified that Ms. Bolanos told him that she had not one, but two connections (96). The male voice on the tape is never referred to by name (Exhibit Gx 3-B).

By pre-arrangement, Ms. Bolanos met Agent Rodriquez on April 9th at a Burger King Restaurant in Queens, where she was arrested with the contraband (37-38). Ms. Bolanos allegedly told the agent that the cocaine came from the same connection that he spoke with on the telephone on April 7th (38, 94-95). This heresay statement constitutes the crucial link between the appellant and the April 9th transaction, without which it is doubtful that sufficient evidence was presented to send the case to the jury.

2. The Out-of-Court Statement of Yolanda Bolanos

There is confusion as to what point in the transaction of April 9th that the statement of Ms. Bolanos was allegedly uttered. This represents an important point because Agent Rodriquez changed his narrative between his initial direct examination and his later re-call testimony in an apparent effort to bring the declaration under the umbrella of Rule 801 (d)(2)(E) of the Federal Rules of Evidence, relating to statements of a co-conspirator made during the course and in furtherance of the conspiracy.

On direct examination, Agent Rodriquez testified that after meeting Ms. Bolanos at the Burger King, he invited her to sit in the back seat of his car. Once in the car, she removed the cocaine from her carrying bag and handed it to Rodriquez' partner, Detective Petraglia. It was then after the contraband had been transferred, that a conversation ensued regarding the sourse of the cocaine and whether Rodriquez could obtain more narcotics. Ms. Bolanos then was told she was under arrest (37, 38).

Faced with the problem that Ms. Bolanos' statement might be excluded by the court by reason of the fact, inter alia, that it was not made during the course of and in furtherance of the instant transaction, but rather after the purposes of the venture was accomplished upon the transferring of the

cocaine to the agents, the United States Attorney appealed to the court to permit him to recall Agent Rodriquez and question him further on the chronology of events at the Burger King. At a side-bar conference (81-82), the proscecutor stated that he had spoken to Rodriquez during the luncheon recess concerning the agent's conversation with Ms. Bolanos at the Burger King. Based on his conversation with Rodriquez during the recess, he now contended that the statement was made during the course of and in furtherance of the transaction and, for this reason, he should be permitted to re-call the agent to elicit further testimony despite a previously sustained objection on this point.

The court finding itself on the horns of a dual dilemma as to whether there was sufficient independent evidence linking the appellant to the April 9th transaction which would permit Ms. Bolanos' statement to be admitted as that of a co-conspirator and whether the statement was in fact made during the course of and in furtherance of the transaction, reversed itself twice before finally permitting the statement to stand as evidence (56-59; 80-91).

On re-call, Agent Rodriquez now stated that the conversation took place as soon as she entered the vehicle and before the transfer of the cocaine (95).* And in a significant further revelation, the agent related that Ms. Bolanos told him that she had not one, but two connections and that part of the delivery came from another source.**

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* At a colloquy before the court prior to his being re-called, Rodriquez first told the court that "as soon as she delivered the narcotics, we talked...(93)" before shifting to his subsequent version that the conversation took place before delivery--adding further confusion as to when, and if, the conversation took place.

** Ms. Bolanos apparently gave the agent conflicting information concerning her source of supply: first stating that the delivery came from the man on the phone (38), then that part of it came from a second connection (94,96) and later

He asked her if she could obtain more cocaine and she allegedly answered that she "would have to go back and ask this connection. Now, two connections." (96).

On Re-cross, the agent denied discussing this portion of his testimony with the U.S. Attorney during the lunch recess (97-98)--in direct contradiction to what the prosecutor related to the court in the side-bar conference at page 82.

The agent further stated that he had no independent knowledge as to the source of the cocaine and that it was possible that both of Ms. Bolanos' so-called connections could be known by the name of Roberto (98-99).

Although conceding that the independent evidence linking the appellant to the April 9th transaction was thin (193), the court denied "with trepidation" appellant's motion to strike Ms. Bolanos' out-of-court statements (198).

Voice Identification

Agent Rodriquez identified the unknown male voice on the April 7th tape recording (Gx 3-B) as that of the appellant, based on a comparison of the disputed recording with a telephone recording of the appellant's voice made after his arrest six weeks later. The unknown male on the April 7th tape spoke in a low sometime whispered Spanish for a period of fifteen seconds (74,75). On the comparison tape, the appellant spoke in a normal register and made no attempt to disguise his voice (76). Agent Rodriquez said he had never spoken to this man prior to April 7th (72) nor had he had any further conversations with this person until the date of arrest some six weeks later (76).

(Fn. continued from last page). . .

that it all came from one source (94)--raising doubts as to the truthfulness and reliability of her out-of-court statements.

Although it can be argued that fifteen seconds of muted conversation is hardly a sufficient basis upon which a voice identification can be made, it is undisputed that this goes to the weight and not the admissibility of such evidence under Rule 901 (b)(5) of the Federal Rules of Evidence.

To tip the scales, however, the government introduced, over objection, the testimony of MARGRITA MENSA, a spanish interpreter, who had been asked by the government to make a voice comparison of the two tapes. She said that she had never heard the appellant's voice, but listened to the tapes many times and concluded that the voice on the disputed tape was the same as the voice of the person on the post-arrest tape (179-180).

She conceded that she was not an expert in voice identification; that she was unable to undertake a word-by-work analysis of the tapes on any scientific or expert level; that she was unable to find similar words on the tapes to be used for comparison, except for the expression "Um, um" which is repeated twice on the first tape and once on the second and the English word "hello" which appears twice on the disputed tape and that there was nothing particular or distinctive about the voices on the recordings (177,179,180,184,185).

Yet it is apparant that the jury gave significant weight to her testimony. When the jury was listening to the tapes during deliberations one of the panel requested that the segment where the voice says "hello" be played again (275). Soon thereafter, the jury reached its verdict.

Appellant's Post-Arrest Statements

After appellant's arrest on May 17 some six weeks after the alleged transaction the appellant give false and evasive information to the agents regarding his name, address and recent whereabouts. He also first denied knowing Livia Burtron, but then said he knew her from a bar. He denied ever being in her apartment (53-54, 109, 115, 116). The agents were aware that the appellant was an illegal alien (77-78, 118). Despite recognizing "its ambiguity" (192), the court admitted appellant's statements over objection on the basis that they exhibited consciousness of guilt.

Agent Berberich also stated that he saw the appellant in the vicinity of Livia Butron's apartment house on April 9th, but a review of his notes showed that he did not in fact make any notation as to the location where he allegedly saw the appellant (117, 121). In addition, it was never established that the April 7th telephone call did in fact originate from Ms. Burtron's apartment (62), nor that she was in any way involved in the April 9th transaction.

POINT I

APPELLANT WAS DENIED A FAIR TRIAL BY THE ADMISSION OF THE OUT-OF-COURT DECLARATIONS OF YOLANDO BOLANOS

Pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, extrajudicial declarations of a co-conspirator are admissible against the appellant if made during the course and in furtherance of the transaction that took place on April 9, 1976.

It is likewise clear that there must be independent evidence establishing appellant's participation in the venture before such declarations are admissible against him. Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680 (1942); United States v. Calabro, 449 F. 2d 885 (2d. Cir, 1971), cert. denied 404 U.S. 1047, cert. denied, 405 U.S. 928.

It is well settled in this Circuit that the trial judge must make this preliminary determination. United States v. Geaney, 417 F. 2d 1116, 1119 (2d Cir.), cert. denied, 397 U.S. 1028 (1969). To satisfy the threshold test of admissibility, the government must show by "a fair preponderance of the evidence independent of the hearsay utterances" that the appellant associated himself with the transaction that took place on April 9th. United States v. Geaney, supra, at page 1120.

Moreover, even in situations where an extrajudicial declaration by a co-conspirator may at first blush fall with the scope of Rule 801 (d)(2)(E), this does not in itself assure its admissibility if it is determined that appellant's constitutional right to confrontation has been violated within the principles enunciated in Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed. 2d 213 (1970).and construed by this Circuit in United States v. Puco, 476 F. 2d 1099 (2d Cir.), rehearing, 476 F. 2d 1106, cert. denied, 414 U.S. 884 (1973).

These general principles lead us into two areas of analysis relevant to this case: (1) Whether the out-of-court statements of Yolanda Bolanos are admissible under Rule 801 (d)(2)(E); and (2) nothwithstanding such admissibility under the rules of evidence, whether based on the particular facts of this case appellant was denied his right to confrontation of witnesses under the Sixth Amendment of the United States Constitution.

A. Admissibility Under Rule 801 (d)(2)(E)

(i) "during the course and in furtherance of the conspiracy"

Under either version of Agent Rodriquez' narrative relating to the circumstances of Ms. Bolanos' statement at the time of her arrest, it cannot be said that the declaration was made during the course and in furtherance of the venture. For all practical purposes, once Ms. Bolanos stepped into the car and was ready to transfer the cocaine, no further conversation was necessary to effectuate the purpose of the transaction and she was within the solid grasp of the law enforcement officers. It is unmistakeable that Agent Rodriquez' questioning of Ms. Bolanos was for the purpose of obtaining incriminating information about her source of supply and not for the purpose of concluding the April 9th transaction. None of the information relating to the identity of her connections was necessary to complete the transaction and there is no indication that Ms. Bolanos felt compelled to identify her source of supply in order to close the deal.*

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* Shedding light on the agent's motive in questioning Ms. Bolanos is his statement to the court at page 93 that "As soon as she delivered the narcotics, we talked...we wanted to see, possibly to get more narcotics."

The fact that the agent changed his narrative when re-called to the stand, denied dicussing the matter at recess with the United States Attorney and revealed that Ms. Bolanos allegedly told him that she had not one, but two connections, which was in variance with other statements attributed to her regarding her source of supply, casts grave doubt on both the credibility of essential elements of the agent's narrative and on the reliability of accepting Ms. Bolanos' hearsay statements for the truth of where she actually obtained the cocaine for the April 9th deal.

In all likelihood, Rodriquez' first version of the facts is probably closer to the truth, when he testified that the statement was uttered after the contraband had been turned over his partner. As Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed. 2d 441 (1963), tells us, a co-conspirator's statement is admissible against another co-conspirator "where it is in furthance of the criminal undertaking...all such responsibility is at an end when the conspiracy ends."

And by way of summing up the applicable rule, Wong Sun held that "a co-conspirator's heresay statements may be admitted against the accused for no purpose whatsoever, unless made during and in furtherance of the conspiracy."

(ii) Independent Proof

As a further prerequisite to the admissibility of Ms. Bolanos' declaration, the government must show by sufficient independent non-heresay evidence that appellant participated in and associated himself with the transaction of April 9th.

Appellant was arrested some six weeks after the alleged transaction took place. If we accept the identification of appellant as the man on the April 7th telephone call, it still must be remembered that that conversation involved a deal that was to take place on April 8th in Brooklyn for different price and amounts of drugs. As the trial court said at page 58, "...for all we know...he pulled out and she had to get it from another source."

The fact that appellant gave false pedigree information at his arrest some six weeks after the transaction, admitted knowing Livia Butron and was allegedly seen in the vicinity of Livia Butron's apartment on April 9th is hardly sufficient independent corroboration that he was associated with the April 9th deal. There is no evidence that Livia Burtron was herself involved in the April 9th venture, so that any tenuous connection with her cannot establish independent proof of participation by the appellant in the sale. The appellant was not charged with conspiracy to distribute narcotics, but rather of having aided, abetted and participated in a specific sale of cocaine that took place on April 9, 1976.*

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* Decisions in this Circuit have consistently required more evidence that has been presented here to establish independent corroboration. Membership in a conspiracy is not established by evidence of mere association with co-conspirators, United States v. Cirillo, 499 F. 2d 872 (2d. Cir. 1974), cert. denied, 419 U.S. 1956, or by the fact that a defendent told a willing buyer how to make contact with a willing seller, United States v. Hysohion, 448 F. 2d 343 (2d Cir. 1971); nor does the fact that a defendent may have been involved in an earlier transaction imply sufficient awareness of the instant transaction to qualify him as a joint-venturer. United States v. Sperling, 506 F. 2d 1327 (2d Cir. 1974), cert. denied 420 U.S. 962.

The only evidence against the appellant that spans the gap between April 7th and April 9th is the hearsay declaration of Ms. Bolanos. By reason of the lack of sufficient independent corroboration of appellant's participation in the April 9th transaction, her hearsay statement is inadmissible.

B. Right of Confrontation

Notwithstanding the possible admissibility of the declaration under Rule 801(d)(2)(E), appellant's conviction must be set aside by reason of his denial of his right of confrontation guaranteed by the Sixth Amendment.

"The Sixth Amendment's right of an accused to confront the witnesses against him is...a fundamental right...." Pointer . Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L.ED.2d 923, 926 (1965).

Decisions by the Supreme Court recognize that "cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him," Pointer v. Texas, supra, 380 U.S. at 404, and that admission in the absense of cross-examination of certain types of suspect and highly damaging statements is one of the "threats to a fair trial against which the confrontation clause was directed," Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968).

In Dutton v. Evans, supra, Justice Stewart's opinion made clear that the fact that an out-of-court declaration comes within a traditional hearsay exception does not in itself assure the constitutionality of its admission into evidence. "...we have more than once found a violation of confrontation values even though the statements in issue were admitted

under an arguably recognized heresay exception," Dutton, supra, at page 82.*

Justice Stewart indicated in Dutton that a recognized hearsay exception must give way to the constitutional principal when an out-of-court statement involves evidence in any sense "crucial" or "devastating" (at page 87) or where the declaration lacks an "indicia of reliability" that would assure the trier of the fact a satisfactory basis for evaluating the truth of the prior statement. Dutton, supra, at page 89, citing California v. Green, 399 U.S., at 161, 26 L.Ed. 2d at 499.

In United States v. Puco, supra, 476 F. 2d 1099 (2d Cir. 1973) this Circuit construed Dutton as requiring a case-by-case analysis in determining whether the application of an exception to the hearsay rule complies with the confrontation clause. The Puco court concluded that the "exception apparently applies at least where the statement is clearly trustworthy and in not "crucial" to the prosecution or "devastating" to the defendant. Puco, at 1103.

On rehearing, the court in Puco, 476, F. 2d 1106, clarified its initial decision by not specifically requiring that the trial judge make a finding that the out-of-court statement was "crucial" or "devastating" but concluded that for future applications of Dutton to similar situations, "we suggest that when a co-conspirator's out-of-court statement is sought to be

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* In his concurring opinion in Dutton, Justice Blackmun prefers using a due process standard under the aegis of the Fifth Amendment to test federal and state rules of evidence. The Supreme Court has long recognized that the right to confront and cross-examine witnesses is one of the minimum essentials of a fair trial. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297. Whichever standard is applied, either due process under the Fifth Amendment or the right to confrontation under the Sixth Amendment, the use of the hearsay declarations in the instant case fails to pass constitutional muster.

offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absense of any cross-examination," Puco, at page 1107.

Applying the standard enunciated in Dutton and Puco, can be it safely concluded that Ms. Bolanos' declaration bears the "indicia of reliability" required for admission, when viewed against such factors as her conflicting statements regarding her source of supply and the fact that she allegedly obtained drugs from more than one connection, raising questions as to where she indeed obtained the cocaine for the April 9th deal, and the questions previously raised concerning the credibility of the agent's testimony.

Given the tenuous foundation supporting the voice identification, the ambiguous nature of appellant's false post-arrest statements and the lack of clear evidentiary chains linking him to the April 9th occurrence, the statement of Ms. Bolanos looms, in the words of Dutton and Puco, both "crucial" to the proscecutor and "devastating" to the appellant. Simply stated, her statement makes an otherwise weak case strong. See United States v. Kelly, 526 F. 2d 615 (8th Cir. 1975).

In Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965), the state of Alabama charged two defendants with a crime and tried them in separate trials. The state used a statement by one defendant in the trial of Douglas, the second defendant. Douglas was unable to cross-examine his co-defendant, although, as here, he was provided the opportunity to cross-examine the officers who testified regarding his co-defendant's statement.

The Supreme Court reversed Douglas' conviction holding that the cross-examination of the officers could not substitute for cross-examination of the co-defendant to test the truth of the statement itself.

Surely, in a situation where the alleged co-conspirator's statement forms such an essential part of the government's case and is so damaging to the appellant, the same reasoning compels the exclusion of Ms. Bolanos' hearsay declarations. Her statement is the key that opens the door to proving the government's case, but that door is slammed in the face of the appellant.

POINT II

APPELLANT WAS DENIED A FAIR TRIAL BY THE IMPROPER BOLSTERING OF AGENT RODRIQUEZ' VOICE IDENTIFICATION

If we accept the trial court's reasoning that the jury required a bridge to span the gap between Spanish and English in its determination of the voice identification, then it follows that the witness, Margrita Mensa, must be able to provide a concrete analysis upon which she derived her conclusion--for Agent Rodriquez already had spanned that same bridge for the jury. Otherwise, she is simply bolstering the identification of Rodriquez and is in no better position to render an opinion than a thirteeth juror.

Testimony by a witness that he recognized the accused by his voice is admissible, provided that the witness has demonstrated a basis for the identification. 1 Wharton's Criminal Evidence, 13th ed., 373-376; United States v. Ladd, 527 F. 2d 1341 (5th Cir. 1976).

Ms. Mensa could point to nothing more specific in her analysis than a comparison of "Um's" and "hellos". She testified that there was nothing distictive or unusual about the disputed voice that would make it easily recognizable.

In a close case, this is hardly a sufficient foundation to permit her to testify in a context where the jury will obviously consider her testimony as that of an expert. That Ms. Mensa's evidence was given significant weight and might well have tipped the scales in the government's favor is shown by the jury's request to re-play that portion of the tapes containing the word "hello."

The recent case of United States v. Armedo-Sarmiento, 2d, Cir., slip op., 10/28/76, in which an interpretor who had listened to tapes twenty to thirty times was permitted to make a voice identification, does not necessarily aid us here. The court's opinion in Armedo-Sarmiento does not contain sufficient facts regarding the basis for the interpretor's identification and the length and number of disputed tapes and voice samples or whether other identifications were made by the agents in the case.

In the instant case, the voice on the disputed tape spoke in a muted tone for fifteen seconds and Ms. Mensa could not provide a detailed analysis supporting her conclusion. On these facts, her testimony was inadmissible opinion evidence, the effect of which was to invade the province of the jury and to deny appellant a fair trial.

POINT III

APPELLANT'S POST-ARREST STATEMENTS WERE IMPROPERLY ADMITTED INTO EVIDENCE

After his arrest on May 17, some six weeks after the April 9th transaction, the appellant gave false and evasive answers to the agents regarding his name, address and recent whereabouts.

The statements were admitted over objection on the basis that they showed consciousness of guilt.

Notwithstanding that these statements had questionable and ambiguous probative value because of their remoteness from the date of occurrence, their admission also compelled the appellant to reveal to the jury that he was an illegal alien in order to provide an explanation for his false answers. This, no doubt, was of additional prejudicial detriment to the appellant.

The principals underlying the admission of evidence indicative of a guilty mind is summarized in Richardson on Evidence, 10th Ed., Sections 167, 220. Richardson explains that if such evidence is too remote or speculative to support an inference of consciousness of guilt, or if the probative value of the evidence is slight and clearly outweighed by the danger of undue prejudice, the evidence should be excluded.

Richardson finds that the cases have consistently acknowledged the weakness of this type of evidence when unsupported by other proof of a substantial character. Although concealment by the accused may be shown as evidencing consciousness of guilt, such evidence ordinarily is of slight value unless there are facts pointing to the motive which prompted it.

The post-arrest statements of the appellant should have been

excluded by reason of their remoteness from the date of the alleged transaction, the uncertain and ambiguous motives which may have prompted the evasive answers and the danger of inducing undue prejudice upon the minds of the jury. For these reasons, the admission of these statements denied appellant a fair trial.

POINT IV

FACTUAL ISSUES PRESENTED WERE SO CLOSE THAT THE PREVIOUS THREE POINTS SHOULD BE VIEWED IN COMBINATION

Based on the close factual and evidentiary issues presented in this case, even if no single point raised in this appeal constitutes reversible error, the cumulative effect of in the previous three points mandates a re-trial.

The Second Circuit recognized the problem of cumulative prejudice in United States v. Kahaner, 317 F. 2d 459 (1963). There the Court in discussing appellant's final contention that even if no one matter alone called for reversal the points raised should be viewed in combination concluded "that is particularly true with respect to a jury trial where there was such real basis for the existence of reasonable doubt and the consequences of a wrong verdict are so tragic." 317 F. 2d at 485. This Court went on to say that "the closeness of factual issues bears directly on the magnitude of error required for reversal." (ibid.)

In Knapp v. United States, 311 F. 2d 71 (5th Cir. 1962) the Court stated that "this court may and will, where the case as a whole presents an image of unfairness which has resulted in the deprivation of defendant's constitutional rights, reverse even though none of the claimed errors is sufficient in itself to require reversal..."

The admission of prejudicial and improper evidence as discussed in the foregoing three points has resulted in depriving the appellant of his constitutional right to a fair trial. As such, the cumulative effect of such errors requires a reversal of appellant's conviction.

CONCLUSION

BY REASON OF THE FOREGOING, THE JUDGMENT OF CONVICTION MUST BE REVERSED AND THE CASE REMANDED WITH DIRECTION TO ENTER A JUDGMENT OF ACQUITTAL; IN THE ALTERNATIVE THE CASE MUST BE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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